IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4650 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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KP INDUSTRIES - Petitioner
Versus
MAUSAM FOOD & 1 - Respondents

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Appearance :
MR PREMAL R JOSHI for Petitioner.
MR RR SHAH for Respondent No. 1.
RULE SERVED for Respondent No. 2.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 20/11/2006
ORAL JUDGMENT

1. The petitioner - original plaintiff has filed this petition under Article-227 of the Constitution of India praying for quashing and setting aside the impugned judgment and order of the learned City Civil Judge, Ahmedabad below an application Exh. 21 in Civil Suit No. 3028 of 2004 dated 23.2.2005 whereby the amendment sought to be made by the original plaintiff in Civil Suit No. 3028 of 2004 has not been granted and the said application has been rejected.

2. Heard Mr. D.M. Desai, learned advocate appearing with Mr. Premal Joshi, for the petitioner and Mr. R.R. Shah, learned advocate appearing for the respondent.

3. It is the case of the petitioner that the petitioner is proprietary concern engaged in the business of processing, marketing, packaging, exporting and

selling food products such as spices etc, since 1983 in the trading name and style of “MAUSAM”. The petitioner has acquired reputation and goodwill in the market with respect to their products sold under the Trade Mark containing or consisting of word MAUSAM. The petitioner has also obtained necessary license from the concerned authorities for the export of their goods processed and packed by them.

4. The petitioner has filed Civil Suit No. 3028 of 2004 against the present respondents before the City Civil Court, Ahmedabad for passing off action coupled with injunction and accounts of profit under Trade Mark Act, 1999. The learned City Civil Judge, has granted ex-parte interim injunction which was challenged by the present respondents before this Court in Appeal From Order No.411 of 2004. While disposing of the said Appeal From Order on 18.12.2004 this Court has permitted the petitioner to make an application for amendment. In view of the objection raised before this Court by the present

respondents with regard to the names of 'K.P.Industries' and 'K.P.Enterprise', the Court has directed the learned City Civil Judge to consider an application for amendment and to make fresh interim order without being influenced by any observation made in this regard.

5. Subsequent to this the petitioner has moved an application Ex.21 before the City Civil Court, Ahmedabad seeking substitution of para-2 of the plaint of the suit. The original para-2 of the plaint of the suit reads as under :-

> “It is submitted that over a period of time the Plaintiff's business developed and flourished all over India. Hence, in 1991 the Plaintiff formed a company K.P.Enterprise, whose proprietor is Mr.Rajesh Nurudinbhai Panjvani. After formation of said concern, Plaintiff has obtained Fruit Products Order (F.P.O.) licence from Ministry of Food Processing Industries for carrying out the business of manufacturing and selling various types of sharabats and syrups. Since then also the plaintiff is in the business of manufacturing and selling sharabats and syrups under the trade mark and trading style MAUSAM. The said K.P.Enterprise was formed for the purposes of manufacturing and marketing pickles, variety of sharabats, different types of syrups etc, in 1991. The said K.P.Enterprise is given a licence by the Plaintiff to use Plaintiff's trade mark MAUSAM, and

goodwill acquired by the Plaintiff in the market.

6. By virtue of the amendment application the substitution sought to be made in para-2 is as under:-

> “It is submitted that over a period of time the plaintiff's business developed and flourished all over India. The plaintiff states that the plaintiff alongwith his two brothers and their family members reside together at their ancestral home at Dhrangadhra. The plaintiff's family was running a provision store at Dhragadhra in the name and style of Janata Kirana Store. The construction of the firm was modified from time to time. Even now that said Kirana Store is carrying on the business mainly of selling of goods manufactured by plaintiff and K.P.Enterprise. The said Janata Kirana Store is at present sole proprietorship of plaintiff's father. When the plaintiff's business expanded, it was decided by the family that the should venture into manufacturing and marketing Pickles, Syrups, Sharbats and other Food Products. Hence in 1991 a proprietor y concern by the name of K.P.Enterprise was formed as per the needs of the family for the expansion of business. Mr.Rajeshbhai Nuruddin Panjwani, who is the younger brother of Mr.Kishorebhai Nuruddin Panjwani is the sole proprietor of K.P.Enterprises. It is further submitted that the said K.P.Enterprises was formed for the purpose of manufacturing and marketing pickles, variety of sharbats, different types of syrups, etc., and the said K.P.Enterprises was given the license by the plaintiff to use the said trade mark MAUSAM. The said K.P. Enterprise thereafter, has obtained the Fruits Product Order (FPO) license from the Ministry of Food Processing Industries for carrying out the business of manufacuturing and selling various types of Sharbats and Syrups.”

7. While considering this amendment application the learned City Civil Judge has observed in his order that the plaintiff has made an attempt to fill up the gap which he has already left in the original suit. It has been further observed that if such amendment is allowed to be introduced, the whole nature and gamut of the suit will automatically be changed and the interest of the defendants would definitely be jeopardized. The learned Judge has further observed that there is substance in the arguments of the learned advocate of the defendants that the original plaintiff has suppressed some material facts and at belated stage amendment is made.

8. It is this order of the learned City Civil Judge which is under challenge in the present petition. Mr. D.M. Desai, learned advocate appearing for the plaintiff – petitioner has submitted that in view of the provisions contained in Order VI, Rule-17 the amendment which is made by the petitioner ought to have been granted by the learned City Civil Judge.

He has further submitted that there is no change in the pleadings etc. It does not alter the nature of the suit and for the purpose of deciding the real controversy between the parties the amendment ought to have been granted by the learned City City Judge, Ahmedabad. In support of his submissions he relied on the decisions of this Court in the case of Prabhudas R. Patel & Ors., Vs. Heirs of Patel Motibhai B, reported in 1997(3) GLR 2471, the decisions of the Hon'ble Supreme Court in the case of Sampathkumar vs. Ayyakannu and Anr., reported in (2002)7 Supreme Court Cases 559 and in the case of Jayanti Roy vs. Dass Estates Pvt. Ltd., reported in AIR 2002 SC 2394.

9. Considering the provisions of Order-VI Rule-17 and facts of the preset case as well as the aforesaid decisions, Mr. Desai has strongly submitted that the amendment ought to have been granted by the learned City Civil Judge and the impugned judgment and order of the learned City Civil Judge deserves to be quashed and set aside.

10.Mr. R.R. Shah, learned advocate appearing for the respondent on the other hand has strongly objected to the order passed by the learned City Civil Judge and submitted that the said order does not call for any interference by this Court while exercising powers under Article-227 of the Constitution of India. He has submitted that the learned City Civil Judge has considered the entire facts and circumstances of the case, pleadings of the parties as well as plaint of the suit and notice of motion and has arrived at the just and proper conclusion which cannot be disturbed by this Court, as admittedly there is no infirmity in the order passed by the learned City Civil Judge. The discretion which was vested in the learned City Civil Judge has been rightly exercised and hence the said order should not be disturbed. He has relied on the decision of this Court in the case of Bakunvarba Jakhubha Jadeja through Power of Gajendrasinh M. vs. Chandubha Gumansingh Zala, reported in 1996 (3) GLR 245 and in the case of M/s.Modi Spinning & Weaving Mills Cl.

Ltd., and Anr. vs. M/s.Ladha Ram & Co., reported in AIR 1977 Supreme Court 680 and in the case of Ramanlal Ambalal Patel vs. M/s. Hina Industries, reported in 1993(1) GLR 820. He has submitted that in view of the aforesaid judgments of the Hon'ble Supreme Court as well as this Court and in view of the settled legal position, the substitution of para 2 of the plaint sought to be made is not permissible**.** The entire suit will be changed if the amendment is granted. He has submitted that Janata Kirana Store was not in picture at all and by giving such family history the present petitioner has canvassed before this Court that the alleged Trade Mark i.e. MAUSAM was used by them since long. As a matter of fact, both these entities, namely, K.P. Enterprise and K.P. Industry are all together different firms and by pleading that the trade mark was used by them since long is nothing but canvassing totally a new case, which is not permissible under Order VI, Rule 17 of the Code.

11. After having heard the learned advocates appearing for the respective parties and after having gone through the respective pleadings and authorities cited before the Court and after examining the relevant statutory provisions contained in the Civil Procedure Code, more particularly, Order-VI, Rule-17, this Court is of the view that the learned City Civil Judge, Ahmedabad has erred in observing that by moving such amendment application and if it is granted, nature of the suit will be changed. As a matter of fact the plaintiff has filed suit for passing off action, injunction and accounts of profit and initially an ex-parte injunction order was passed. That order was challenged by the respondents before this Court and while vacating the ad-interim stay, present petitioner was permitted to move an application for amendment and the same is directed to be considered by the learned City Civil Judge on the basis of the amendment sought to be made by the present petitioner. From the order passed by this Court earlier it appears that dispute with regard to K.P. Enterprise as well as K.P. Industry was raised

before this Court and to make certain clarification with regard to that the petitioner has sought an amendment in the plaint. If one considers the original para-2 of the plaint as well as substitution preferred, one can hardly find any material change. It is true that name of Janata Kirana Stores appears but it is only by way of giving family history. It does not change the entire nature of the suit. Other averments would remain the same. Even otherwise, if the amendment is granted the right of the respondents will not adversely be affected and no prejudiced be caused to them. The suit is still at the stage of notice of motion hearing. Even the N.M hearing is not completed. It is open for the respondents to raise their pleas/disputes which are raised before this Court. The respondent have filed their reply to notice of motion and written statement together. It is, however, still open for them to file written statement to the amended plaint and to raise all these issues. The Court is, therefore, not accepting the submission of Mr. Shah that by granting this amendment the entire complexion of

the suit will be changed.

12.I will now consider the relevant authorities cited before the Court by the learned advocates appearing for the respective parties.

13.In the case of **Prabhudas R. Patel & Ors., Vs. Heirs of Patel Motibhai B** (Supra) this Court has held that ultimately, it is exercise of discretion by the Court and that discretion shall have to be judicially exercised. All amendments ordinarily are required to be allowed which satisfy the two conditions, first not working injustice to other side, and second of being necessary for the purpose of determining, the real questions in controversy between the parties. If the impugned order of the learned City Civil Judge is examined on this touchstone it cannot be said that while rejecting the amendment application he has exercised the discretion judicially. If the amendment is granted it will not work injustice to the respondent. Moreover, the amendment sought to be

made is necessary for the purpose of determining the real questions in controversy between the parties.

14. In the case of **Sampath Kumar vs. Ayyakannu and another** (Supra) the Hon'ble Supreme Court has held that the Order-6 Rule-17 of CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion

thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment. So far as present case is concerned the amendment sought to be made is at the pre-trial stage, as the notice of motion hearing is still pending. On the basis of observations made by the Hon'ble Supreme Court in this judgment, the learned City Civil Judge ought to have granted the amendment as the defendant would not be prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended.

15.In the case of **Bakunvarba Jakhubha Jadeja**

through Power of Gajendrasinh M. vs. Chandubha Gumansingh Zala (Supra) this Court has held that if the amendment in the pleading is sought by way of deletion and substitution and if it is seeking to displace the party completely from the admissions made by the other party in the pleading, such amendment should not be ordinarily allowed as it will irretrievably prejudice the other party. In fact, the other party has the opportunity of relying upon the admission made by the party in his pleading. The other party could rely upon such admission. However, if such admission is permitted to be deleted, prejudice will be caused to the other party. In short, when the averments made in the pleadings constitute an admission of facts or existence of set of circumstance, on which opposite party has placed reliance or could place reliance and on which the opposite party could base his defence or already based his defence, such admission made in pleadings cannot be permitted to be deleted by way of amendment under Order-6 Rule-17 of the C.P.Code

because that would substantially prejudice the defence of the defendants as defendants would not be thereafter in a position to extract out such admission from the plaintiff. This judgment would however not render any assistance to the respondent. Though the amendment application refers to the substitution of para-2 of the plaint, it, however, amounts to addition of some more facts, reference of which is already made in the original para-2 of the plaint. There is no deletion of any admission nor giving go by to any existing facts. Because of the dispute raised by the respondent with regard to the synonymity of the name, namely, K.P. Enterprise and K.P. Industries, certain clarifications are required to be made and only with a view to bring detailed facts on record which would help the Court to adjudicate upon the issue and to decide the real controversy between the parties, the said amendment was made. Even otherwise, the issue as to whether K.P. Enterprise and K.P Industries, these two entities are same or different one is still open to be agitated by the respondent and by granting this

amendment it cannot be said that the Court has conclusively accepted the contents of the amended para-2 of the plaint of the suit.

16. In the case of **M/s. Modi Spinning & Weaving Mills Cl. Ltd., and Anr. vs. M/s. Ladha Ram & Co.,** (Supra), wherein the Hon'ble Supreme Curt has held that it is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs-25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. It is not the case here. By seeking such amendment it cannot be said that the petitioner – plaintiff is displacing the respondent completely from the admission made by the petitioner in the plaint of the suit. It cannot, therefore, be said that

the respondent would be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendant.

17. In the case of **Jayanti Roy vs. Dass Estates Pvt. Ltd.**, the Hon'ble Supreme Court has held that It is settled that amendments to pleadings which are moved at the proper stage and not unduly delayed should not normally be refused. In the application raising dispute on payment of rent under S. 17(2) and (2A) of the Act the appellant has right from the beginning denied relationship of landlord and tenant between the parties. An amendment was moved stating that on discovery of additional evidence and material, Alamohan Dass was merely a 'permissive occupier' in respect of one of the Dags. The appellant also sought leave to explain the nature of her possession and occupation. There does not appear any material inconsistency between the original averments in the application and those proposed by amendment. Looking to the facts of the present case

it can certainly be said that there is no material inconsistency between the original averments in the plaint of the suit and those proposed by amendment.

18. In the case of **Ramanlal Ambalal Patel vs. M/s. Hina Industries** (Supra), this Court has held that the principles governing the grant or refusal of amendment are too well-known to be supported by any authority. To put it generally, the approach in the matter of amendment of the pleadings should be liberal. All amendments which do not change the nature of the suit or do not take the other side by surprise and prejudicially affect the case of the other party, or which do not put the other side to an irretrievably position, and which arise from the same cause of action should normally be permitted to be carried out or made in the pleadings. At the same time, it is now well settled that if, by the amendment, the entire nature of the suit is changed, or if entirely new cause of action is sought to be introduced or inconsistent plea is sought to be brought in, or a plea

which cannot stand together with the one already existing in the pleadings is sought to be inserted or a plea which would prejudice the case of the other side or take away the vested right of the other side is sought to be put up for the first time by way of amendment, then such amendment should certainly be rejected. Looking to the facts of the present case, it could not be said that by virtue of the amendment sought to be made by the petitioner – original plaintiff, the entire nature of the suit is changed nor it can be said that the entirely new cause of action is sought to be introduced or inconsistent plea is sought to be brought in or vested rights of the respondent – original defendant are sought to be taken away.

19. In the case of **Baldev Singh and others vs. Manohar Singh and another, reported in (2006) 6 Supreme Court Cases 498**, the Hon'ble Supreme Court held that the powers of the Court are wide enough to permit amendment of the written

statement by incorporating an alternative plea or ownership in the application for amendment of the written statement. The Court further held that the facts stated in the application for amendment were in fact the elaboration of the defence case. Here in the present case, by moving such amendment it is merely an elaboration of the existing facts which are already mentioned in the original para-2 of the plaint of the suit. Even the Hon'ble Supreme Court has permitted to raise alternative plea by granting an amendment in the written statement. Here the petitioner – plaintiff has not raised the alternative plea. The petitioner has merely elaborated the plea which was already raised in the original para-2 of the plaint of the suit. The petitioner's case is, therefore, straightway covered by the ratio laid down by the Hon'ble Supreme Court.

20. Considering the aforesaid legal position, this Court is of the view that the amendment which is sought for is well within the purview of Order-VI Rule-17 and, therefore, for the purpose of deciding the real

controversy between the parties, the amendment is required to be granted.

21. In the above view of the matter, the impugned order passed by the learned City Civil Judge, Ahmedabad is hereby quashed and set aside. This petition is allowed. Rule is made absolute without any order as to costs.

22. Mr. R.R. Shah, learned advocate appearing for the respondent has prayed for stay against the impugned order. However, since Notice of Motion is still to be heard and the respondent will have an ample opportunity to meet with the amended plaint, no prejudice will be caused to the respondents if the amendment is granted. Hence request is rejected.

[**K. A. PUJ, J.**]

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